

TEXAS ALCOHOLIC BEVERAGE COMMISSION
COMMISSION MEETING
MONDAY, APRIL 22, 2002

The Texas Alcoholic Beverage Commission met on this date in Room 185 at 5806 Mesa Drive, Austin, Travis County, Texas. Members present: Allan Shivers, Jr., Chairman; John T. Steen, Jr., Member and Gail Madden, Member. Staff present: Rolando Garza, Administrator; Randy Yarbrough, Assistant Administrator; Lou Bright, General Counsel; Jeannene Fox, Director of License & Compliance; Greg Hamilton, Chief of Enforcement and Denise Hudson, Director of Resource Management. Present to receive certificate of service: Rick Hewlett, General Services Department. Visitors included: Sandi Donoho, State Auditor's Office; Julie Ivie, State Auditor's Office; Juan Sanchez, State Auditor's Office; Mike Alexander, Austin; Tom Spilman, Wholesale Beer Distributors of Texas; Mike McKinney, Wholesale Beer Distributors of Texas; Robert Sparks, Licensed Beverage Distributors, Inc.; Alan Gray, Licensed Beverage Distributors, Inc.; Greg Tatro, Sterling City Fraternal Order of Eagles; Fred Marosko, Texas Package Stores Association; Rick Donley, Beer Alliance of Texas and Mike McElhaney, Governor's Office of Budget and Planning.

The agenda follows:

1:30 p.m.- Call to order.

1. Recognition of agency employees with 20 or more years of service.
2. Approval of minutes of March 25, 2002 meeting; discussion, comment, possible vote.
3. Administrator's report:
 - a. discussion of staff reports;
 - b. recognitions of achievement;
 - c. discussion of management controls; and
 - d. state auditor's update.
4. Fiscal stewardship of agency; discussion, comment, possible vote.
5. Presentation of TexasOnline, the e-government web portal for the State of Texas and the agency's participation through an Opportunity Proposal.
6. Public comment.

Announcement of executive session.

7. The commission may go into executive session to consult with legal counsel regarding the pending litigation of Martinez v. TABC pursuant to Texas Government Code, §551.071.

Continue open meeting.

8. Take action, including a vote if appropriate, on topics listed for discussion under executive session.
9. Adjourn.

The meeting was called to order at 1:37 p.m. by Chairman Shivers.

MR. SHIVERS: I will call this meeting of the Texas Alcoholic Beverage Commission to

order. It's one thirty-seven on April 22, 2002.

The first order of business is to recognize employees who have 20 years or more service with the agency. The first is Rick Hewlett who joined this agency on April 1, 1982 as a Clerical Supervisor III in Austin. Currently, Rick serves as the agency's property manager, record retention manager and safety officer. As noted in his previous evaluations, "Rick has always shown a great initiative to achieve goals and accomplish work duties." Congratulations.

MR. HEWLETT: Thank you.

MR. SHIVERS: Brent Lee, a lieutenant in the Beaumont office, joined the commission on April 3, 1972 as an Inspector I in the enforcement division. As noted in his previous evaluations, "Brent consistently demonstrates his knowledge of the code, rules, policies, procedures and regulations and maintains a high quality of work." A native of Groveton, Brent is a reliable and dedicated employee who has contributed to the agency's work for 30 years. Brent could not be with us today, and his certificate has been forwarded to him. We congratulate him on his service.

MS. MADDEN: Mr. Chairman?

MR. SHIVERS: Yes, Ms. Madden?

MS. MADDEN: I want to say something that's been on my mind. I think everybody knows that our esteemed chairman has graciously extended his tenure. I've noticed that when people come in the door as a new commissioner, there's a lot of fanfare, but when they go out, nobody ever says anything.

MR. SHIVERS: Am I leaving?

MS. MADDEN: I don't know. This might be premature, but...

MR. SHIVERS: They probably know more than I do.

MS. MADDEN: I was afraid that I was going to show up at a meeting sometime and you weren't going to be here. So, I decided that I would like to say - and I know Commissioner Steen joins me in this - we would both just like to thank you. As I say, this is probably premature, but we'd just both like to thank you for your dedication, your commitment, your vision, your insight, your strong leadership and your wonderful in-depth knowledge of the code and especially for your service to the people of Texas.

MR. SHIVERS: Thank you very much. It's very kind of you.

MR. STEEN: Very eloquently put, and I agree with everything you say. Thank you very much, Mr. Chairman. We hope you are around longer.

MS. MADDEN: We will probably be saying this next year.

MR. SHIVERS: It's a great pleasure to serve with both of you, and it's certainly been an honor to serve with the staff of the TABC as long as I have.

Approval of the minutes of the March 25th meeting were mailed to the commission. Are there any changes to be made?

MS. MADDEN: No.

MR. STEEN: No.

MR. SHIVERS: Do I have a motion to accept the minutes?

MS. MADDEN: I so move.

MR. STEEN: Second.

MR. SHIVERS: All in favor, say aye.

MS. MADDEN: Aye.

MR. STEEN: Aye.

MR. SHIVERS: Aye. Opposed?

Administrator's report. Mr. Garza?

MR. GARZA: Mr. Chairman, Commissioners, first thing I'd like to bring to your attention is among your briefing materials you will find the final report from the State Auditor's Office on an audit done on this agency a few months ago. We have brought the subject to the commission in some of the previous meetings. You will remember that the audit sought to address several objectives. One of them was to determine whether or not we had an efficient method of issuing licenses and permits here at TABC. Also, it sought to determine whether or not we were properly detecting violations of the Alcoholic Beverage Code within the enforcement division, if we were safeguarding the seized property and assets that the agency collects and seizes in the course of its operations and whether or

not we had proper information reports available to the agency.

Sandi Donoho is the project lead. She's here with us. Julie Ivie and Juan Sanchez are also here this afternoon to answer any questions that you might have regarding the report. I will tell you that the executive staff has had opportunity to take a look at this in much detail. We are very pleased with the recommendations. I think it gives us some opportunities to address some issues that will only enhance some of the things that we do. We view it in a very positive vein, in terms of working with the State Auditor's Office in trying to improve some of those areas they have cited as needing some improvement. I will ask if Sandi will come forth in the event you have any questions with regard to any items that their audit team has found.

MS. MADDEN: I don't have any questions. I just underscore what Mr. Garza has said. It's a very comprehensive report, and it certainly is going to enhance our work here at the agency. Thank you so much.

MR. SHIVERS: Are there any suggestions you have for the agency that aren't included in your report?

MS. DONOHO: No, not that I can think of. I think we pretty much covered it all in the report. Let me say that overall this was probably one of the better audits I've done in the last few years. I think that we ended up finishing our field work early because we didn't find a whole lot here. We feel like overall the agency is in good shape. There's a few things that maybe would enhance the situation, but there were no significant negative findings at all.

MR. SHIVERS: One of the commission's primary goals, of course, is to find ways to increase the efficiency of our operations, not only in terms of time but in terms of cost efficiency. I think you've helped us with this audit to identify some areas that could use attention to help us toward that goal. Are there any other areas that you didn't mention that you can suggest?

MS. DONOHO: I really can't think of anything. We looked hard, and things overall are in really good shape. We did make a few minor suggestions. It had to do with performance measures and the backlogs for the renewals of licenses and, of course, some work on replacing your M204 system, which we understand has to do with funding.

MR. SHIVERS: Always a problem.

MS. DONOHO: Yes.

MR. SHIVERS: John, do you have any questions?

MR. STEEN: No questions. Thank you for your work.

MR. SHIVERS: Gail?

MS. MADDEN: No.

MR. SHIVERS: Thank you. If anything occurs to you or if you encounter better practices that other agencies are using that we might benefit from, we'd appreciate your passing it along to us.

MS. DONOHO: I'd be glad to. Thank you.

MR. GARZA: Mr. Steen, you had expressed an interest in the past on our promotional process. I'd just like to let you know that last week we had eight candidates come in to vie for the captain position. We had about 13 for the lieutenant rank, and we have about 30 agents coming into town this week, as they take a written test and they go through an interview panel and then we assemble our eligibility list off of that. This represents the first time we've used this process with the revised promotional system that we developed here about a month or two months ago. We are going to have people coming in from all over the state, like we did last week, to get on our eligibility list.

Last thing, you will see this display over your shoulder here. It represents a proclamation issued by Governor Rick Perry's Office declaring the month of April as Alcohol Awareness Month. As you know, every year about this time, TABC launches a campaign that we've dubbed Safe Prom/Safe Graduation where our agents are very busy working with different schools across the state, other law enforcement agencies, Mothers Against Drunk Driving, Texas Petroleum and Marketers Convenience Store Association, the Texas Hotel & Motel Association as well as with members of the industry in targeting underage drinking. We were fortunate to get this proclamation through the governor's office. We will be using it in combination with a campaign that we've collaborated with the Texas Safety Network, and this is also among your briefing materials. There are a couple of posters that were developed with the Texas Safety Network which is an organization dedicated to bringing alcohol issues to a public forum, including underage drinking. We've been very fortunate to establish a good working relationship with this group, and these posters will be sent out statewide to high schools here in Texas.

That's all I have, Mr. Chairman.

MR. SHIVERS: Thank you. Any questions for the administrator?

MR. STEEN: No questions.

MS. MADDEN: No.

MR. SHIVERS: Fiscal stewardship of the agency. Ms. Hudson?

MS. HUDSON: We looked at the second quarter performance measures this month. The average cost of inspections is below. There have been more activities associated with education which brought the salaries that were allocated to the enforcement activities down.

MS. SHIVERS: Explain that to me. I read it in the material you sent me, but I'm not sure I understand the calculation.

MS. HUDSON: Roy takes the salary cost and he looks at the work performed, and based on the percentage of work that was performed - if 50 percent of the work was for educational activities, 50 percent of the salaries go in that column and the other half is for enforcement activities. So, depending on what the agents are working on is how those salary costs will be split. We report to you only on the average cost of enforcement activities so, in this particular quarter, more of the salary costs were attributed to education. The split there was a higher...

MR. SHIVERS: So, in a period in which you have a few educational activities going on, then almost all the salary would be allocated toward inspection, no matter what the intensity of the inspection activity may be. Is that correct?

MS. HUDSON: Correct.

MR. SHIVERS: So, it's not a measure of the intensity of the inspection activities?

MS. HUDSON: No. It's just a mathematical equation that associates average cost.

MR. SHIVERS: I'm not sure I like the measure, but I can't think of a better way to do it, frankly.

MS. HUDSON: The other measures we have exceeded in. There is more coverage in the licensed establishments. At this point, we would expect about 50 percent of the licensed establishments to have been inspected and they are running above that. The compliance activities are up and the number of alcoholic

beverage containers and cigarette packages stamped at the borders is also up.

We did also provide some information on West Texas...

MR. SHIVERS: Why do you think you are getting more containers being stamped coming across the border? Is it NAFTA or is it increased tourism or what? Spring break?

MS. FOX: Basically, since September 11th, it's been erratic. In Laredo, we've had an all time high. In Progreso, we are continually exceeding our all time highs, and the rest of the ports are down from their general revenue and containers that were imported for the same time last year. Basically, we have a lot of increase in container numbers because of cigarettes.

MR. SHIVERS: Do we have an inspection station at the bridge at Pharr?

MS. FOX: Yes, we do.

MR. SHIVERS: How are the numbers there?

MS. FOX: Pharr has been fairly steady, about the same. El Paso is down a fair amount.

MR. SHIVERS: I can understand Progreso because I think so many tourists like to cross there.

MS. FOX: That's the tourist friendly bridge. It's so close and you can walk across and it's so convenient. Hidalgo and Brownsville both are down from what they have historically been. A lot of that has to do with the long lines. We have about a 22 percent increase in cigarettes over the same time period last year on the number of containers imported, and we have approximately a 10 or 15 percent decrease in alcoholic beverages coming across. So, the large number that you see that appears to be increasing is really the cigarettes and not alcoholic beverages.

MR. SHIVERS: Okay. An extreme barometer of the effect of taxation on cigarettes perhaps.

MS. FOX: Cigarettes have gone up continually since about five years ago. Every month, they exceed the prior month. Every quarter exceeds the prior quarter by pretty high amounts. Last year, about half a million of what we collected was in cigarettes. When you talk about 41 cents a carton, that adds up more than what you anticipate.

MR. SHIVERS: Thank you.

MS. HUDSON: The other item that we reported on was the West Texas Disaster Recovery and Operations Center. This is the area where we moved the mainframe to last July. Things out there have been going quite well. They give us weekly reports and if there's problems, there's conference calls. We had some minor performance problems last week when they changed some T-1 lines out, but that hopefully is being resolved and everything should be going okay again.

MR. SHIVERS: Any questions for Ms. Hudson?

MR. STEEN: No questions. Thank you.

MS. MADDEN: No.

MR. SHIVERS: Thank you.

I understand item five has been pulled from the agenda. Is that correct?

MR. GARZA: Mr. Chairman, I'd like the commission's approval to table this until the June meeting. We've had some issues raised from members of the industry that are legitimate in nature. I believe we need to take a closer look at the staff level and come back with the issue at the June meeting.

MR. SHIVERS: No objection to table number five for now?

MR. STEEN: No, sir.

MS. MADDEN: No.

MR. SHIVERS: Item six - public comment. We have two people who have signed up to speak to us. Mr. Tatro from Sterling City. You are requesting a revision of a section of the Alcoholic Beverage Code?

MR. TATRO: Yes, sir.

MR. SHIVERS: I think that's more properly addressed at the legislature, but since you've driven down here from Sterling City, we will hear you.

MR. TATRO: Thank you, Mr. Chairman. My name is Greg Tatro. I am a resident of Sterling City, Texas. I want to thank you for the time given me to address the commission today.

I am here today to request that the commission consider changing the TABC code in regards to Title 3, Section 32.14. Currently this code reads as follows:

“No permittee, licensee, or any other person shall deliver, transport, or carry an alcoholic beverage to, into or on the premises of any establishment, location, room, or place purporting to be a club, or holding itself out to the public or any person as a club or private club, unless the club holds a private club registration permit.”

As written, the code suggests that any group of Texas citizens who gather together as a club or fraternity are not allowed to bring beer or any other alcoholic beverage to their meeting, gathering, function or whatever. I, and many others across the state, believe this to be over restrictive. Any adult individual is allowed by law to personally consume alcohol in the State of Texas, including dry counties. A club or fraternity is nothing more than a group of such individuals sharing a common interest or goal and, therefore, should have the same rights as individuals. Surely, the intent of the TABC and the law is that these clubs or fraternities are not permitted to store or sell alcoholic beverages without a valid permit, but may bring and personally consume alcohol at their functions.

It has been my experience that this section of the code is not enforced equitably across the state. Some TABC enforcement agents say you can bring alcohol to club meetings if for personal consumption. Other agents say no. The result is utter confusion for the general public. I even consulted the TABC legal counsel and got mixed messages. First, they said you could bring alcohol to a club or fraternal function then later changed their story. Surely all the fraternities on Texas university campuses do not have a license to sell alcohol, yet it is public knowledge that alcohol is present at their functions. The same holds true for countless numbers of clubs and fraternities across the state, including lions clubs, pinochle clubs, horseshoe clubs, music clubs or the endless numbers of other clubs in the State of Texas.

In the interest of providing a clear and concise TABC code for the public and enforcement agents to follow, I respectfully submit that the commission take my request under consideration and act to change this section of the code as requested to clearly state its intended purpose - that being you cannot store or sell alcohol without a valid registration permit.

Thank you. I'm open to any questions or comments.

MR. STEEN:

What's the code section you refer to?

MR. TATRO: Section 32.14.

MR. TATRO: It also applies to fraternities as well as clubs or private clubs.

MR. SHIVERS: Mr. Hamilton, will you address yourself to the uneven interpretation of the code?

MR. HAMILTON: As far as the frats, on the most part, one of the things that occurs there is they will go out and get a person that has a license and they will cater that particular location. I'm sure there are fraternities and different clubs out there that have a function and aren't selling alcoholic beverages. I would think it would be legal for those individuals to take in their own alcoholic beverages to a private setting. We would have to ask Mr. Lou Bright.

MR. SHIVERS: Mr. Bright, the ball is in your court.

MR. BRIGHT: It strikes me that Section 32.14 is fairly clear and, I understand, without being imminently familiar with our enforcement efforts, that it's clear around the state and enforced as such to the extent that it comes to the attention of our agents. It is a provision that says if these are the premises of something holding itself out to be a club, then it's not only that you may not store or sell but you may not mix or serve. You may not possess alcoholic beverages there.

I do not remember an issue or a question coming up about fraternity houses, but I do think that it is common that fraternity locations are just that - they are people's private residences. Every one of my acquaintances - and I'm not heavily vested in the fraternity world - has people actually living there. That is a different situation in my mind, I believe, than a commercial establishment or a place like that - the lodge hall, the VFW hall, the KFC hall, an aerie of the Order of the Eagles, those kinds of things.

Our legislature, I think, has been pretty clear that unless and until they get a permit from us, and that is that we regulate conduct with alcoholic beverages on those premises, they may not possess alcoholic beverages there.

MR. SHIVERS: Mr. Tatro, are you prohibited in some way from having a private club registration permit?

MR. TATRO: I can explain the situation that actually brought this about. I was very ignorant of the TABC code. I hope to think I'm not as ignorant as before. I belong to the Fraternal Order of Eagles which is a national nonprofit

charity organization. They donated over 14 million dollars this year to organizations around the country. They are perhaps not so well known, but they are one of the finest charity organizations in the nation. We are a fraternal order. Our motto is "People Helping People." We are a fraternity and all fraternities across the State of Texas, they have social functions. They have fund raisers, etcetera. Of course, as they say, after you've been a fraternal order for a period of a year you may apply for an alcoholic license which we in Sterling City will do. However, we are young and we've got a year to go. It's increasingly difficult for us to hold functions such as barbeques, dinners, fund raisers, music, etcetera, when people - I'm talking all people - are not allowed to bring a beer, a glass of wine or anything to any of these functions precisely because of Section 32.14. It prohibits it.

I contend and say this is a violation of civil liberties. An individual in the State of Texas may consume alcohol. I do not understand the purpose of the code that states when 10 or more people get together they can't do that. Not only can they not do that in a building, they can't do that in a park, they can't do that under a tree or anything. This is what has been explained to me by the TABC enforcement agents. I think that is very restrictive and infringes on individual rights. I can understand that you cannot store or sell alcohol without a license. That is clear. I have no problem with that, but for people to personally bring their beer or whatever to an outdoor function and be prohibited to do so, it seems overly restrictive to me.

MS. MADDEN: Are you in a dry area?

MR. TATRO: Yes, ma'am, but this code does not apply to dry counties. It applies statewide to the State of Texas.

MS. MADDEN: I know in Dallas most of our area is dry, and the people that work under the same rules that you are working under have their functions catered because the caterers have a license.

MR. TATRO: We are a young fraternity in a small town. We can't afford catering. Part of our thing is charity and it's to raise money for charity. Nobody gets paid. We are totally nonprofit. As small as we are, we've done some very charitable things that we are proud of, but this is really hampering it because of the situation. Even in that dry county where I live, people drink and not all members from our fraternity drink.

MR. STEEN: Mr. Tatro, did you get cited yourself?

MR. TATRO: Yes. Four people, as a matter of fact.

MR. STEEN: What's the status of that?

MR. TATRO: Court pending. Trial is in two days.

MR. STEEN: Where is the trial taking place?

MR. TATRO: Sterling City. I'm not here about that. I agree with Mr. Bright. The code is clear, but my reason for being here is I don't believe this code is fair. Let me put it to you a different way. Someone please tell me the purpose of that code, to tell people that you cannot consume a beer because you call yourself a club anywhere in the State of Texas. I don't understand it. I can understand if there's concern that people are going to stockpile and sell it without a license. Obviously, the commission gets no taxes and no income from that and that is illegal.

MR. SHIVERS: Whether or not we are sympathetic to your position, I will say you are going to find a lot of sympathy from people that say some provisions of this code don't make much sense because it's been cobbled together over the last 70-odd years, but it is not the function of this agency to rewrite the code. We are merely charged with enforcing the code and administering it. The legislature writes it, adopts it and passes it. I think if you want a change in 32.14, the proper forum to which to address yourself would be the state legislature. Are there any regulations or rules pertaining to 32.14 over which we have some influence?

MR. BRIGHT: There are not, at least none that apply to this. As you well know, you have the authority - and you have a broad authority - to pass rules that interpret the provisions of the Alcoholic Beverage Code, and we've done that on several occasions. That authority is limited by the fact that you may not pass a rule that contravenes what the statute says. For example, when the statute says you may not engage in this kind of conduct on the premises of a club absent a permit, I don't believe you have the lawful authority to pass a rule that says, "Well, in certain circumstances you can." I think that rule would be dead on arrival at the courthouse when it was challenged.

MR. SHIVERS: We are not interested in passing non starters.

MR. STEEN: Mr. Bright, what about the propriety of us discussing this when they've got a case that's pending?

MR. BRIGHT: It is not an administrative case that is pending because there is no permit

there. It is a criminal prosecution in which our agents will play a role as witnesses presumably but, as commissioners, you play no role in that, so it is certainly appropriate to discuss it here in this room.

MR. SHIVERS: Sorry you have the problem, but I don't think we can help you.

MR. TATRO: So, I need to go to the state legislature?

MR. SHIVERS: Yes, sir. I would suggest you contact your local representative and senator.

MR. TATRO: I apologize. I thought the commission actually was a legislative branch.

MR. SHIVERS: I suggest you contact your local representative and senator and, if you are unaware of who that may be, I'm sure someone here can give you their name and address and how to contact them.

MR. TATRO: Thank you.

MR. SHIVERS: Thank you.

Mike Alexander?

MR. ALEXANDER: My name is Mike Alexander. I have a severe problem with this little to go store next to my house. It's a small issue, I'm sure, compared to what you normally deal with, but it's a very unusual issue.

It involves extreme nuisance, blatant violations of city codes and zoning. It involves a secondary business not directly related to beer sales which is the reason it's sort of unusual and I think deserves some more attention.

I've been in civil battles with the store for three years now. The city is fighting the store also on zoning violations. The store has a history in the past of drinking around the store and other problems as well. Somehow this person has been able to continue operating for a long time. Now, with the civil problems going on, he's effectively stalling my actions in court. He's been stalling the city. He's been ordered not to operate the secondary business and his trucks are still coming and going. It's reached the point where you actually have to set up security cameras to watch the property and to call out building inspectors when the problem comes up.

What gives this person the power to continue doing this in a store like this with a TABC license? At some point you have to ask is this really the criteria for a person who holds a TABC license and is it really time to step

in and look at an issue like this at a much broader scale? Just what do you expect from a license holder? Should he be fighting the city and be a continuing nuisance to a neighboring home like this? That's why I want to bring it to your attention because it's not something that a field agent can go out and do because it's not selling alcohol to underage or something like that. It's an unusual situation. I'm going to be fighting it for another year, it looks like. I just think it's time I get more powerful help.

I don't really want to go into the details in public except to say it's civil battles. It's really reached the point where you have to monitor the property just to ensure zoning compliance.

MR. SHIVERS: We understand the problem. You are not the only one who has had this problem around the state.

MR. ALEXANDER: If you look at the history of this store, you'd be surprised it's been able to go on as long as it has.

MR. SHIVERS: This is what's generally called the West University area here in Austin. Is that correct?

MR. ALEXANDER: That is correct.

MR. SHIVERS: It's a block from my office. I know where it is.

MR. ALEXANDER: I just want you to take this into consideration and consider what a license holder should....

MR. SHIVERS: Is that the one that's next to that Italian restaurant?

MR. ALEXANDER: Yes.

MR. SHIVERS: I know exactly where it is. San Antonio and 29th, roughly?

MR. ALEXANDER: Yes. I'd appreciate some consideration on this. Thanks.

MR. SHIVERS: Mr. Hamilton, would you get the Austin district office to tell me what they know about that.

MR. HAMILTON: Yes, sir. Can I get the name of this place?

MR. SHIVERS: Junior's.

We will look into it and see if we can advise you on how to help your problem.

MR. ALEXANDER: Thank you.

MR. SHIVERS: Executive session. Do we need an executive session today? Mr. Bright, do you have anything to talk to us about?

MR. BRIGHT: I do not. I am available to talk to you, but I do not have any new information to give you this month.

MR. SHIVERS: Very well. We will not have an executive session.

Is there a motion to adjourn?

MS. MADDEN: I so move.

MR. STEEN: Second.

The meeting adjourned at 2:10 p.m.